No. 2562

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

YEP KIM YUEN,

Appellee.

BRIEF FOR APPELLEE

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FACTS.

It is conceded by the Government that Yep Kim Yuen is the son of Yep Lung Gon, who claims to be a native born citizen of the United States. It is also

conceded that the father has been a resident of the United States for a long period of time and has made two trips to China and was permitted to return to the United States as a citizen thereof on both occasions after inspection by the proper immigration authorities.

The proceedings before the Department of Labor in the appellee's case may be summarized as follows: Yep Kim Yuen arrived from China at the Port of San Francisco, on September 20, 1913; he immediately applied for admission as a citizen, basing his claim upon the citizenship of his father; he was given a hearing, at which, among other evidence, the father produced a certified copy of Habeas Corpus proceedings in the United States District Court of the Northern District of California had in 1890, by which he was adjudged to be a native born citizen of the United States. After a consideration of the evidence, the Commissioner of Immigration at the Port of San Francisco, decided that the father's claim of citizenship was good, from which position he never afterward retreated, but that the applicant, Yep Kim Yuen, had failed to satisfactorily establish his claim that he was the son of Yep Lung Gon, the American citizen. An appeal was thereupon taken by Yep Kim Yuen to the Secretary of Labor, who reversed the finding of the Commissioner on the question of the boy's nativity, deciding that he was in fact the son of Yep Lung Gon. The Secretary, or rather the Acting Secretary, then went further and, taking up the question

of the father's identity, sent the case back to the Commissioner at San Francisco with instructions to *require the father to prove himself to be the identical Yep Lung Gon who was in* 1890 *adjudicated a citizen by the District Court.* "In absence of such *proof* after reasonable opportunity to produce it," the instructions to the Commissioner were to exclude the son. (Memorandum of Acting Secretary, Rec. 35-36—also quoted in Government's brief at page 4). Upon receipt of these instructions, the Commissioner directed the father to produce proof of his identity, which he did. Upon consideration of this evidence, the Commissioner, as is alleged in subdivision 1 of paragraph IV of the petition for a writ of Habeas Corpus (Trans. p. 5), did again determine and find that the father was the same Yep Lung Gon who was adjudged a citizen in 1890, that is to say he did not alter his original judgment in favor of the father.

The applicant was not permitted to land however, but was still detained on Angel Island while the question of his father's identity was referred to the Immigration Bureau at Washington, where another separate and private investigation was conducted as will appear by inspection of the Supplemental Memorandum for the Acting Secretary, dated February 18, 1914. (Record 74-75 and Gov. Brief 5-6-7). It appears by this memorandum (Gov. Brief p. 6), that a comparison was made between a copy of the tin-type photograph of the father attached to the Habeas Corpus record in 1890 and his photo-

graph taken 23 years later in 1913. The comparison was made in Washington by Chief Flynn of the Secret Service Division of the Treasury Department.

No notice of this inquiry and no opportunity to rebut it was given the applicant or his father in San Francisco. This is conceded. It is alleged in the petition for a writ of Habeas Corpus that the Secretary of Labor considered matters which were never incorporated in any record had or produced at the Port of San Francisco and which the applicant and his father at no time were given an opportunity to rebut, deny, explain or overcome. (Trans. 5-6). These allegations are not denied but are in fact supported by the memorandum and written reports and decisions had in Washington contained in the record produced in the District Court and quoted in the Government's Brief at pages 4, 5, 6, 7 and 8.

On the strength of the comparison made by Chief Flynn and notwithstanding the evidence adduced in San Francisco and the judgment of the Commissioner and the two prior adjudications by the Department, the Acting Commissioner General, F. H. Larned, on February 14, 1914, recommended the deportation of the son Yep Kim Yuen. (Supplemental memorandum for the Acting Secretary, Record 74-75, Gov. Brief 5-6-7). Nowhere in the records, exhibits or the transcript does it appear that any further action was taken on the Acting Commissioner General's recommendation by the Sec-

retary of Labor. The Supplemental Memorandum for the Acting Secretary and recommendation of deportation referred to bears at the end the legend, "Approved. J. B. D." (Gov. Brief 7), which we are told by Counsel for the Government on page 5 of Government's Brief is the "signature of approval of the Acting Secretary, J. B. Densmore." Counsel for the Government may be right although the record does not bear him out. On November 18, 1913, in the "Memorandum for the Commissioner General," (Record 35-36, Gov. Brief 4), Louis F. Post signs himself the Acting Secretary. Thereafter, so far as the record and exhibits in the case of Yep Kim Yuen are concerned, the signature of an Acting Secretary does not appear. It does appear, however, that an officer "W. J. P." was directed to advise Mr. Wolf, the attorney for the applicant in Washington, of the action and recommendation of the Acting Commissioner General, and the approval of J. B. Densmore. (See note at end of Acting Commissioner General's supplemental memorandum at page 7 of Gov. Brief). It also appears that Mr. Wolf desired an oral hearing before the Acting Secretary. It will be noted that the recommendation of deportation had been approved by J. B. Densmore before Mr. Wolf had been advised. It does not appear that Mr. Wolf was granted an oral hearing. It does appear that two days after the recommendation of deportation and approval by J. B. Densmore, to-wit: on February 17, 1914, the officer "W. J. P." took Mr. Wolf to the Police Headquarters in

Washington, where two "identification experts" of the police department, whose names do not appear, passed unfavorably upon the photograph of the father and the copy of his tin-type taken 23 years before. (Memorandum for consideration in connection with the case of Yep Kim Yuen, quoted on pages 7-8 Gov. Brief). This memorandum was of no value either to Mr. Wolf or to the Department as the case of Yep Kim Yuen had been closed two days prior thereto.

This we claim is a correct recital of what transpired before the Department of Labor in the Yep Kim Yuen case as disclosed by the memoranda with the dates and initialing attached thereto and which appeared for the first time among the records at the port of San Francisco when they were introduced in evidence by the Government at the hearing before the District Court.

The proceedings in the District Court which followed the receipt by the Commissioner of the order to deport the boy are contained in the Transcript and are briefly as follows:

A petition for a writ of Habeas Corpus was presented to the District Court by the father on behalf of his son (Trans. 2-8 inc.). A demurrer to the petition was interposed by the Government. (Trans. 10). An order to show cause was issued (Trans. 9-10). The demurrer was then argued and submitted. Upon the submission of the demurrer, the Government handed to the Court the documents and memoranda of the Immigration Bureau already de-

scribed herein and variously referred to as exhibits and records. This mode of presenting the Government's case to the Court was of the Government's own choosing, and if it makes an imperfect record, it is in no manner the fault of the appellee. In all cases of this character, a return in regular form with a statement of facts in denial of a petition is the proper procedure. At the time of the introduction of this documentary evidence by the Government, the Court called to the stand Dr. John E. Gardiner, Immigrant Inspector and Government Interpreter and expert on Chinese handwriting. Dr. Gardiner had testified before the Department of Labor that the signature of the father Yep Lung Gon and the signature of Yep Lun Gon in the Habeas Corpus proceedings in 1890 were made by the same person. (See Decision of Acting Commissioner General, quoted on page 7 of Gov. Brief.) He gave the same testimony before the District Court. (Ord. Overruling Demurrer. Trans. 11). It is conclusive as to the identity of the father, and his testimony was as much a part of the record as anything else and should be before this Court in the printed Transcript.

Counsel for the Government refers to the fact that John E. Gardiner testified before the District Court as a witness, but he neglects to inform the Court that the witness was called and testified as an expert on Chinese handwriting. The fact that John E. Gardiner testified appears in the Order Overruling the Demurrer (Trans. 11). Dr. John E. Gardiner for

more than thirty years has been the trusted expert of the executive department having charge of the executing of the laws relating to the Exclusion of Chinese. He has also been received as an expert on Chinese handwriting and matters of identification of Chinese by the Courts. Where the authenticity of records or of Chinese documents has been in question it is common knowledge that his judgment has been taken as authority. It is also commonly known that he was the Mr. Vrooman referred to by Judge Hoffman in Tung Yeong's case, and upon whom the District Court relied so completely and to whom the books of the Chinese Six Companies relating to the identity of Chinese were submitted before they were given any weight in Court. Dr. Gardiner at that time was known by the name of his father by adoption.

In re Tung Yeong. 19 Fed. 184-187.

When the District Court, passing on the law, overruled the demurrer (Trans. 11), the writ of Habeas Corpus was issued (Trans. 11-12). On the day fixed for a return to the writ, the Government declined to make any further return thereto. In truth, a return to the writ of Habeas Corpus under oath would have been impossible, because in good faith, the officers at this Port could not have denied the political status of the father or the parentage of the son. Under the writ, the boy was brought into Court and was discharged.

ARGUMENT.

The identity of the father of the boy is the only disputed question between the appellee and the Secretary of Labor.

The question which was presented to the Court below and which now presents itself to this Court for determination is:

Did the Secretary of Labor have the right to dispute the identity of the father of the applicant and, if so, did he dispute it and render his judgment thereon fairly, in good faith, and without abuse of the discretion vested in him by law?

After a full hearing of the matter before the District Court, at which time the law of the case, and the entire record of the immigration bureau and the evidence adduced before said bureau on the question of the father's identity was fully considered, the Court, after due consideration, decided as a matter of law that the petition alleged a sufficient ground for the issuance of a writ of Habeas Corpus and that the citizenship of the father and his son had been sufficiently established both in fact and in law before the Department of Labor and before the Court itself.

This, we submit, was fully within the powers and duties of the Court. Such course was followed by the District Court of Vermont and was affirmed by the Circuit Court of Appeals of the Second Judicial Circuit in the Case of *United States vs. Chin Len*, 187 Fed. 544, a case very similar to the case at bar.

In that case, Chin Len had been adjudged by a

United States Commissioner in a deportation proceeding to be a citizen of the United States. He made a trip to China and upon his return presented a certified copy of the judgment of the Commissioner as evidence of his citizenship. He was refused admission by the immigration authorities, who among other things held that as a matter of fact he was not the same Chin Len who had been adjudicated a citizen. How far this finding was held to be final, and conclusive on the Court may be seen by the language of the Circuit Court of Appeals.

> "The officials charged with the enforcement of the Chinese exclusion acts should give due force and effect to the judgments of the United States Commissioners. The relator presented to the inspector at Richford a duly authenticated judgment showing that he was not an alien but a citizen of the United States entitled to entry without molestation. *Unless that judgment was impeached or the relator was shown not to be Chin Len,* the inspector had no right to refuse him admittance. Neither of these propositions were established. On the contrary, the judgment has been proved genuine and the attempt to show that the relator was not Chin Len has wholly failed.
>
> "The case is much stronger than many of the reported cases where the Chinese persons seeking entrance endeavored by the testimony of witnesses to establish their citizenship. In the present case that fact had been judicially determined by the finding of a competent tribunal. The inspector was not justified in arbitrarily disregarding the judgment. He could prove it to be invalid or fraudulently issued, but he could

> not treat it as a nullity upon mere suspicion and conjecture. *He was bound to treat it as valid until its invalidity was established.* No relevant question of fact was presented so far as the Commissioner's judgment was concerned or, indeed, upon the question of identity."
>
> *U. S. vs. Chin Len* (*Supra* 187 Fed. 544-549).

The case at bar is even stronger than the case of Chin Len just cited. In this case there was no evidence or reason whatever to refute the genuine character of the adjudication of the father's citizenship except perhaps the opinion of Chief Flynn taken secretly in Washington and not even submitted to Counsel at Washington until after the recommendation of deportation had been made and approved, and never produced at the hearing in San Francisco. On the other hand, there was the judgment of the Commissioner of Immigration at San Francisco, the two prior landings of the father as a citizen on his Court record and the testimony of Dr. John E. Gardiner, the Government's own expert, all in favor of the father.

Counsel for the Government cites one case, *Ex parte Long Lock,* 173 Fed. 203, which in reality supports the District Court in its course in the case at bar.

In the case of *Ex parte Long Lock* (*supra*), the Court, as did the District Court in this case, considered the evidence on which the judgment of the Secretary was based and the evidence on which the applicant's claim of citizenship was based. Long Lock

claimed to have been adjudged a citizen by a United States Commissioner. The Court said, as quoted in Gov. Brief, page 14:

> "Inspector Sperry expressly states here that he did not think the identity of this petitioner with the Long Lock of the certificate had been established. The Department of Commerce and Labor was not satisfied, *and this court is far from satisfied, that this petitioner is Long Lock apprehended and tried before and discharged by Commissioner Johnson in* 1897. Where and when he obtained the certificate issued by Johnson is not shown, except by the bare testimony of the petitioner himself, who bore and was known by a different name in 1905 and 1907, and whose credibility was shaken in his examination before Inspector Sperry. It is not shown that from 1897 to 1905 the petitioner bore the name Long Lock."

In the case at bar, the Commissioner of Immigration at the Port of San Francisco and the examining inspector were satisfied with the identity of the applicant's father. So also was the United States District Court.

In the case of *Ex parte, Long Lock* (*supra*), no one was satisfied with the identity of the applicant. It was obvious that Long Lock was a fraud and the Court properly investigated the evidence and refused to support the fraud.

In the case of *United States vs. Chin Len* (*supra*), the immigration authorities were not satisfied with the identity of the Chin Len, but the District Court of Vermont and the Circuit Court of Appeals of the

Second Circuit were both satisfied with his identity and they properly refused to endorse the deportation and banishment of an American citizen.

In these three cases bearing upon the point at issue, an instructive diversity of conditions present themselves with but a single principle involved. In all three cases exactly the same course was followed by the Courts with the same result; that a decision on the merits of the question was reached in each instance. In the case of *Ex parte Long Lock* (*supra*), the Court upheld the judgment of the local immigration officers that Long Lock was a fraud; in the case at bar the District Court upheld the judgment of the local officers that Yep Lung Gon was a genuine citizen and rejected the decision of the authorities at Washington based on erroneous conclusions and abuse of discretion; in the case of *United States vs. Chin Len* (*supra*), the Court rejected the decision of the immigration authorities based on error, insufficient evidence and unfairness.

ABUSE OF DISCRETION AND UNFAIRNESS.

It is, of course, the claim of the Secretary of Labor that he is the sole and final judge as to any question of fact which arises in an immigration proceeding and there is a tendency, in support of this prerogative, to claim that, where the hearing, so-called, was *fair,* no Court can question the Secretary's finding of fact no matter what the evidence may have been on which it was based. This may have been the conception of the law held by the ad-

ministrative officers after the rendition of the case of *United States vs. Ju Toy,* 198 U. S. 253, so often invoked by the Department of Labor as the bar to judicial intervention in immigration cases. A discussion of the case of Ju Toy is hardly necessary. We will say, however, that Ju Toy sought relief from the Courts upon his bare allegation that he was a citizen of the United States. The effect of the decision was that such representation of itself was not sufficient to give the Court jurisdiction to grant the relief sought. In the next case on the subject however, the case of *Chin Yow vs. United States,* 208 U. S. 8, the relief was again sought in a different way and was granted. The effect of the Chin Yow case was that the Courts would grant relief by Habeas Corpus when a fair hearing in good faith of the applicant's claim had been denied by the administrative officers. It has been rather consistently claimed by the Immigration Bureau that the last mentioned case is authority for claim that the Court can grant relief in no other case; i. e., in no case unless it can be shown that a fair hearing, such as it has been construed to be, has been denied. But this contention has been settled by a case still later than the cases of *U. S. vs. Ju Toy* (*supra*) and *Chen Yow vs. U. S.* (*supra*), viz., the case of *Low Wah Suey vs. Backus,* 225 U. S. 468, in which the Court says:

> "In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the

> proceedings were manifestly unfair that the action of the executive officers was such as to prevent a fair investigation *or that there was a manifest abuse of the discretion committed to them by the statute.*"

That this doctrine has been in the mind of the Court in recent decisions is apparent by the language of the Supreme Court in

> *Lewis vs. Frick,* 233 U. S. 291-300.
> *Zakonaite vs. Wolf,* 226 U. S. 272-274-275.

As to what constitutes an abuse of discretion is for the Court to decide. It is uniformly held that erroneous conclusions of law on the part of the Secretary of Labor give jurisdiction to the Courts on Habeas Corpus.

It has been held by District Judge Bledsoe in the Southern District of California that a conclusion by the immigration officers based upon a lack of sufficient evidence is an abuse of the discretion vested in them by law.

> *Ex parte Bun Chew,* 220 Fed. 387.
> *Matter of Iwata,* 219 Fed. 610.

In none of these cases have the doctrines laid down in the cases of the *United States vs. Ju Toy* (*supra*), and *Chin Yow vs. U. S.* (*supra,* been disturbed. In subsequent cases the Courts have but told us what the law is on questions which had not been before the Court in the Ju Toy and the Chin Yow cases.

Assuming then that the identity of the father was properly subject to question by the immigration officers, we will discuss whether or not it was questioned fairly, in good faith and without abuse of discretion.

On pages 3 and 4 of the Government's brief, the United States Attorney states that

> "when the matter was *first* referred to the Secretary of Labor, the Acting Commissioner General reopened the case and made a further examination and determined that the relationship of father and son did exist and that these representations were bona fide, but that *the father was an imposter* in claiming citizenship under the Court record in the writ of Habeas Corpus issued in 1890 to a Chinese person of the name of Yep Lung Gon."

This is not a correct statement. "When the matter was *first* referred to the Secretary of Labor," it was then considered by the Acting Secretary Louis F. Post, whose memorandum of November 18, 1913, appears on the Record pages 35-36, and is quoted in the brief at page 4.

The unfairness and abuse of discretion was inaugurated from the very writing of that memorandum by the Acting Secretary, November 18, 1913. The matter had been taken to the Secretary at Washington by the applicant upon a *question of his nativity* and not upon a question of his father's identity or citizenship. The boy and his father had supposed that the father's citizenship had been settled. It had been proved before a Court of Law in

1890; had stood the acid test of Government inspection on two former occasions and had finally and for the last time received the stamp of approval of the Commissioner of Immigration and the various immigration officers at the Port of San Francisco. The boy's nativity however, did not satisfy the minds of the San Francisco officers and upon that question only the Secretary in Washington was appealed to. There seems a certain element of irony in the attitude of the Acting Secretary and the Acting Commissioner General in Washington in reversing the San Francisco bureau on the question of the lad's nativity and at the same time nullifying the effect of such reversal by questioning the identity of his father.

An inspection of the memorandum of Acting Secretary Post will disclose at once the error and unfairness of his attitude. He states:

> "The question of the identity of the father with the person of the same name adjudged in 1890 to be an American citizen, appears to be the decisive one in this case."
>
> (Record 35-36, Gov. Brief 4).

In this he was wholly wrong. There was no question at that time of the father's identity. It had not been questioned at San Francisco where the application to land had been made by the son. Nothing had transpired in that regard at all except that the father had established his citizenship and his identity to the satisfaction of the Commissioner at San Francisco.

It seems obvious that to raise the question in the manner indicated was a mere whim of the Acting Secretary. He goes on to state:

> "As appellant has not yet had his 'day in court' on that question, the case is reopened for proof of identity. *In absence of such proof after reasonable opportunity to produce it, exclude.*"

As far as his "*day in court*" is concerned on the question of the identity of his father, we repeat that his father's citizenship and his identity with the Yep Lung Gon of the Habeas Corpus proceedings had been settled in the matter then pending by the Commissioner at San Francisco as well as on two prior occasions. What other "day in court" the Acting Secretary required is impossible of conjecture. Be that as it may, the Acting Secretary, for no valid reason and after favorable judgment by the examining inspector and the Commissioner at the Port where the application was made, arbitrarily and erroneously ordered that the father of the boy produce affirmative proof of his identity with the individual of his same name who had been adjudged in 1890 to be a citizen of the United States, the record of which adjudication was held by the father. In this we say he erred.

IDENTITY OF NAME INDICATES IDENTITY OF PERSON.

It is an inference of fact that identity of name indicates an identity of person. The strength of the

inference is augmented when both surnames and given names are identical.

Sperry vs. Tebbs, 10 Ohio Dec. 318; 16 Cyc. 1055.

Also where the name is not of common occurrence.

Sewell vs. Evans, 4 Q. B. 626.

Or where there is other identification.

Bennett vs. Libhart, 27 Mich. 489.

Such as that furnished by a document produced from proper custody.

Simpson vs. Dismore, 1 Dowl. P. C. N. S. 357; 5 Jur. 1012; 9 M. & W. 314.

Or similarity of handwriting.

Sewell vs. Evans (*supra*).

Names are used as one method of indicating identity of persons.

Meyer vs. Indiana Nat. Bk., 27 Ind. App., 354; 61 N. E. 596.

BURDEN OF PROOF ON GOVERNMENT.

"The production of the statutory certificate establishes prima facie the right to remain, and the burden *then* shifts to the Government which must produce some proof to overcome this prima facie evidence or it will be the commissioner's duty to discharge defendant. The proof should be *clear* and *convincing,* and until the Government has made out such a case, the holder of the certificate *is not required to make further proof.*

2 Corpus Juris 1102.

U. S. vs. Hom Lim, 214 Fed. 456.

But whatever may have been the error or injustice of the Acting Secretary's view the burden was accepted by the applicant's father and affirmative proof of his identity was offered in which was the testimony of Dr. John E. Gardiner, who is accepted by the Government as an expert in Chinese handwriting. Dr. Gardiner compared the signature of the father Yep Lung Gon with the signature of Yep Lun Gon in the Habeas Corpus record and testified that they were the signatures of the same person. This was convincing. The Acting Secretary in his order had said to give the father an opportunity to produce proof of his identity and if he failed to do so to exclude the son. The father produced the proof. But here again occurs another step in the series of blunders and unfairness toward this boy. The Acting Secretary said to exclude *if the proof was not produced.* He did not say to exclude *if the proof was produced.* By plain implication his order carried with it the direction to admit. The original jurisdiction to find the fact in cases of applications for admissions rests with the Commissioner at the port where the application is made. An appeal lies to the Secretary. In the matter under consideration when the proof of the identity of the father was produced at San Francisco, it was the plain duty of the Commissioner to land the boy. His nativity had been established; the father had produced a copy of the adjudication of his citizenship and notwithstanding the unfairness, had complied with the order from Washington and had produced affirmative

proof of his identity. Notwithstanding this the Commissioner at San Francisco still detaining the boy at Angel Island referred the matter back to Washington, *not on appeal for there was nothing then to appeal from,* but for action on a question properly before the bureau at San Francisco and which had already been settled by the Commissioner at San Francisco. However had the Bureau at Washington then decided the question of identity upon the record and evidence produced at the port of San Francisco, the unfairness which already impregnated the proceedings might have been nullified. But such was not to be the case.

Some time after the case was sent back, the opinion of Chief Flynn of the Secret Service T. D. was privately sought on the question of the comparison of the copy of the tin-type on the Habeas Corpus proceedings in 1890 and the photograph of the applicant's father in 1913. No notice or information concerning this private interview with Chief Flynn was given to the applicant, or to his father or to their Counsel in San Francisco or Washington. In fact it may be assumed that no notice of it was given to the Bureau at San Francisco. Thereafter, however, and on February 14, 1914, F. H. Larned, Acting Commissioner General, wrote the excluding decision and it was approved by J. B. Densmore, acting, as we are told by Counsel for the Government, for the Secretary of Labor. (Supplemental Memorandum for the Secretary—Record 74-75. Gov. Brief 5-6-7).

If all the proceedings had been fair and just to the applicant up to this point, the unfair and erroneous conclusions of the Acting Commissioner General as disclosed in this supplemental memorandum, is sufficient to vest the Court with jurisdiction to intervene.

This "supplemental memorandum" is in reality the excluding decision. It is adopted in toto by the initialing of J. B. Densmore.

On November 18, 1913, the Acting Commissioner, Louis F. Post, as we have stated, sent the case back to San Francisco for affirmative proof of the father's identity. (Rec. 35-36; Gov. Brief 4).

The proof was produced as we have heretofore recited in which was the expert testimony of the Government's handwriting expert, Dr. J. E. Gardiner. Yet, in the Supplemental Memorandum and excluding decision written on February 14, 1914, after the case had been sent back to Washington (Gov. Brief 6), the Acting Commissioner General says:

> *"The question of citizenship of the alleged father, however, stands practically where it did when the record was previously considered by the Bureau and the Department."*

Are we to infer from this statement that the testimony of Dr. Gardiner had been withheld from the Acting Commissioner General? That cannot be so for he speaks of Dr. Gardiner's testimony in the concluding paragraphs of his decision. (See page 7 Gov. Brief),—and in so doing he flatly contradicts

his *most important conclusion,* viz.: *that question of the alleged citizenship of the alleged father stood practically where it did when it was previously considered by the Bureau and the Department.*

Obviously the question did not stand where it had before Dr. Gardiner testified. The Acting Commissioner was wholly wrong. That being so his excluding decision and the approval of J. B. Densmore was wrong.

But the error of the Acting Commissioner goes even deeper into the question. It is plain from his decision that the Acting Commissioner General took no stock whatever in the court record of the father's adjudicated citizenship. A reading of his decision will bring the irresistable conviction that he did not at all consider the question of the father's identity and ignored entirely the court's adjudication. We have pointed out that he ignored Dr. Gardiner's testimony as to the father's identity. Nowhere in the decision does he suggest an answer to the fact shown by the Doctor that the Habeas Corpus proceedings in 1890 bears the signature of this boy's father. No other explanation can be given of his attitude in that regard except that he did not consider the father's *identity* as the question in issue. What he was considering was the father's actual *citizenship.* That is apparent from his remark already quoted.

> "that question of *citizenship* of the alleged father stands practically where it did," etc.

If there is any question remaining as to the actual question which concerned the Acting Commissioner in rendering his decision, an inspecton of his language at the beginning of one of his concluding paragraphs, quoted at the bottom of page 6 and at the top of page 7, Gov. Brief, will clear it. He says:

> "There is no question but that the father has been a resident in this country for a great many years,—possibly as long as he claims he has, *but this circumstance does not relieve him of the necessity of establishing the contention which he makes of having been born in the United States.*"

Can the error and unfairness of the decision be made plainer? It was not necessary for the father to show that he was *born* in the United States. He had done that in 1890 before the United States District Court. The only thing the Acting Secretary had required of him to do, and that unfairly, was to produce proof of his identity. The father did produce the proof and it is absolutely plain that the Acting Commissioner did not understand the order of the Acting Secretary, or that he ignored the order and arbitrarily held that the father should have produced proof of his *birth* irrespective of the judgment of the Court.

We have already commented on the memorandum of W. J. P. made two days after the writing and approval of the excluding decision.

The only question remaining which might be asked this appellee is what explanation his father might

have made to Chief Flynn's adverse opinion on the photographs, had he been notified of that opinion. Possibly he would have had no explanation to offer, but that did not relieve the Bureau in Washington of giving the applicant notice of the interview with Chief Flynn. The fact is that no explanation was needed as the opinion of Chief Flynn as to the dissimilarity between the photographs could not possibly outweigh Dr. Gardiner's proof of the identity of the signatures. Photographs taken 23 years apart are without doubt different. Signatures vary much less. It appears in the order overruling the demurrer (Trans. 11), that Mr. Herbert Dugan testified before Judge Dooling. His testimony is properly part of the record, and should have been included in the printed Transcript of the Record. The appellee cannot be blamed for its absence. We comment on this testimony therefore because it is proper that this Court should know the character of the evidence which was considered by the District Court when it issued the Writ of Habeas Corpus herein. The father of this appellee had been a servant in Mr. Dugan's home for many years. Mr. Dugan testified that the father had had certain dental work done in which some of his prominent teeth had been extracted and also that he had had an operation on his eyes. We believe that there is somewhere in the mass of exhibits on file a letter from Miss Worley concerning changes in his teeth—but we have been unable to find it. Certainly that would have altered his appearance to an appreciable de-

gree. Had the father known of the investigation in Washington and the opinion of Chief Flynn, he could have submitted this testimony of Mr. Dugan's, both to the Acting Commissioner and to Chief Flynn himself. Had Chief Flynn known of these circumstances, it is safe to say that his opinion on the two photographs would have been different.

Another explanation which might have been made was that the tin-type attached to the Court record of the Habeas Corpus proceedings in 1890 might have been tampered with by some one seeking to take the record of the father for himself. Dr. Gardiner, who is conceded to be one of the most careful and efficient officers in the service of the United States in investigations of such documentary evidence, pointed out this very possibility to the Acting Commissioner, as is shown in the concluding paragraphs of the excludng decision quoted at page 7 Gov. Brief. The Acting Commissioner says:

> "He (Dr. Gardiner) suggests the possibility of a substitution of photographs (not altogether unknown in these cases) on the original court record."

In other words, Dr. Gardiner knew that if the photograph in the record was not the photograph of the father, it was certain that it had been changed, because *the signature to the record could not have been altered*, and it was the genuine signature of the father of this appellee. Like all other matters relating to the identity of the father, however, this suggestion also was rejected by the Acting Commis-

sioner. Why? Because, as we have said, he required proof of the nativity of the father and not identity.

Viewing this procedure in its entirety, if it was a fair hearing, in good faith, and without abuse of discretion, then the father himself after many years residence in this country could also be deported to China for his failure to convince the Acting Secretary of his identity and of his birth. Such a thing is inconceivable. Under such a procedure any naturalized citizen of the United States could be arrested and put to the almost impossible task of affirmatively establishing his identity and, what is worse, of affirmatively proving that he was entitled to be naturalized at the time he was made a citizen, to the satisfaction of whosoever should be acting as Secretary of Labor.

The question is one of vast importance and means plainly whether the Courts shall surrender to the Immigration Bureau the last vestige of their jurisdiction over the citizens and residents of this country.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully,
Lucius L. Solomons and
Catlin, Catlin & Friedman,
Attorneys for Appellee.